United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1678

To be argued by
JOHN LOGAN O'DONNELL

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

PHILIP ZANE, JEROME E. SILVERMAN,
and ROBERT S. PERSKY,

Defendants-Appellants.

ON APPEAL FROM A DENIAL OF A MOTION FOR A NEW TRIAL OF
THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANT-APPELLANT ROBERT S. PERSKY'S BRIEF

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DEFENDANT-APPELLANT ROBERT S. PERSKY'S BRIEF

Preliminary Statement

This is an appeal from the denial of a motion for a new trial pursuant to Rule 33 of the Federal Rules of Civil Procedure on the grounds of newly discovered evidence and in the interests of justice.

Appellant Robert S. Persky was indicted in March 1973 for filing a false Annual Report with the Securities and Exchange Commission and for conspiracy to file same, in violation of 15 U.S.C. §§ 780 and 78ff. In May 1973 a jury, after long deliberation, acquitted Persky of the conspiracy charges, but found him guilty on the substantive count. On appeal, this Court affirmed the

convictions in a decision dated April 1, 1974. United States v. Philip Zane, et al. (Nos. 560, 561 September Term, 1973), ____F.2d _____ (2d Cir. 1974) [not officially reported].

The Government's case against Persky rested largely upon the testimony of Peter Galanis and Akiyoshi Yamada ("Yamada"). Yamada had been indicted along with the moving defendant as a co-conspirator in the alleged securities violations and additionally, stood accused of a long series of other securities frauds and tax offenses. Pursuant to a plea bargaining arrangement entered into with the United States Attorney's Office, however, Yamada was allowed to plead guilty to three counts. In exchange for his testimony against Persky and the two accountants who were tried with Persky, the Government agreed to disclose his cooperation to the sentencing Judge. Yamada was also given consideration for his testimony before the Grand Jury in a series of other cases.

These facts were disclosed to the jury, but Yamada was represented as a man who had elected to reform himself, and whose testimony was wholly credible, albeit it was, as Judge Mansfield noted, "more than a trace of self interest" [1/] which prompted him to cooperate so fully with the Government.

1/ Slip opinion of the Second Circuit, p. 2499.

Persky's involvement in what this Court characterized as a "Byzantine plot",[2] was introduced, in large part, through the testimony of Yamada, and was based on an extraordinarily complicated series of meetings and conversations, the existence of which Persky had steadfastly denied. Despite the tenuousness[3] of Persky's connection in the "serpentine"[4] course of the alleged conspiracy, much of the testimony incriminating him in the "tangled web of falsity"[5] was Yamada's:

> "The serpentine course of the conspiracy was traced at trial largely through the testimony of Galanis and Yamada."[4]

This Court's opinion also rested upon the wholesale adoption of Yamada's version of certain events. For example, in the Court's second footnote[6] a categorical statement was made as to the existence of a certain "put transaction" which allegedly provided Persky's motivation for participating in this scheme. However, Persky's alleged motivation for engaging in this transaction rests solely upon the word of Yamada; no other witness attributed

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2/ Slip opinion, p. 2495.

3/ The Government's bill of particulars stated that Persky did not know of the heart of what was characterized as the "serpentine" course of the conspiracy.

4/ Slip opinion, p. 2499.

5/ Slip opinion, p. 2497.

6/ Slip opinion, p. 2496.

evil motives to him in connection with this act. In short, it is clear that the jury's verdict and the affirmance by this Court rested on a conscious decision to accept the testimony of Yamada rather than the explanation offered by Persky.

Since the time of trial and during the pendency of the appeal, an incredible series of events transpired which has shattered the reliability of the Yamada testimony. As previously noted, Yamada, although indicted for a wide variety of offenses, was allowed to plead guilty to a lesser number of counts in exchange for his testimony against Persky and the accountants. Yamada was sentenced by Judge Cooper to a term of imprisonment of two years, and subsequently moved for a reduction of the sentence on the grounds that he was thoroughly reformed and currently engaged in valuable community activities, namely, the rehabilitation of drug addicts. As proof of his good works and character, five letters were submitted to Judge Cooper from a doctor, social workers, an employer and an addict, all heartily endorsing Yamada's plea for leniency. (Reproduced in indictment, App. 5-19.)

On January 31, 1974 Yamada was indicted (Index No. 74 Cr. 100) (App. 5-19) on five counts of attempting to defraud the United States in violation of 18 U.S.C. §§

1503 and 2; and on five counts of false writings in violation of 18 U.S.C. §§ 1001 and 2.

The Government stated that the letters which he had submitted to Judge Cooper in support of his plea for leniency were all "false, forged and fictitious;" in fact, the entire intricate scheme which Yamada had attempted to perpetrate on the Court was a tissue of lies and deceits -- he had never engaged in any drug rehabilitation work whatsoever; he was either unknown to persons whose letters of commendation on his behalf he forged, or else such persons were invented out of thin air and their letters fantasized by Yamada and signed by his employees.

On April 15, 1974 Yamada pleaded guilty to six (6) of sixteen (16) counts in the new indictment.

On May 20, 1974 Yamada was sentenced by Judge Lasker and in "explaining his conduct," stated:

> "Prior to my incarceration my feelings about going to prison were no different that I suppose the standard version that one gets about prison from various periodicals, movies, or what-have you and I was scared, I was irrational of every conceivable fear concerning prison. . . ." (App. 45)

If any statement of Yamada is to be taken at face value this recitation of "irrational . . . fear" must be given credence and weighed in light of his "cooperation" with the Government.

The elaborate artifice which Yamada created in his motion for a reduced sentence is strikingly similar to the "tangled web of falsity" in which he sought to enmesh defendant Persky. Yamada was in both circumstances motivated by the same consuming desire for leniency and the complete avoidance of a jail sentence.

It would violate the dictates of common sense to hold that Yamada's earlier testimony was any more credible than the whole tissue of deceits relating to his alleged drug rehabilitation work.

The brazenness of Yamada's deception and the extent of his deceit reveal a pattern of conduct which requires that a new trial be granted to defendant Robert S. Persky.

ARGUMENT

POINT I

IN VIEW OF MESAROSH V. UNITED STATES, THE DISTRICT COURT'S DENIAL OF DEFENDANT'S MOTION FOR A NEW TRIAL CONSTITUTED A CLEAR ABUSE OF DISCRETION

The issue at hand is controlled by Mesarosh v. United States, 352 U.S. 1, 77 S. Ct. 1, 1 L. Ed.2d 1 (1956), and the principles set forth in that case when applied to the facts of the immediate controversy clearly require the granting of defendant's motion for a new trial.

In Mesarosh, petitioners were convicted of conspiracy to violate the Smith Act, largely upon the testimony of seven Government witnesses, including one Joseph D. Mazzei. Subsequent to Mazzei's appearance at petitioner's trial, the Government's attention was brought to the increasingly bizarre and far-fetched testimony given by Mazzei at later, unrelated proceedings. His statements were such as to raise doubts concerning his credibility at previous trials.

Approximately four years after Mesarosh's conviction, and while the case was on appeal to the Supreme Court, the Solicitor General filed motion papers with the Court in which he stated that although several of Mazzei's recent statements were either known or believed by the Department of Justice to be false, the Government believed that his testimony at petitioners' trial "was entirely truthful and credible." The Solicitor General suggested that the issue of Mazzei's credibility at Mesarosh's trial should be determined after a hearing before the District Court Judge.

While lauding the Government's commendable candor, the Supreme Court[7/] held that a new trial was the only correct remedy:

7/ Five justices were for a new trial while three justices believed that there should be a remand for an evidentiary hearing on the issue of Mazzei's credibility.

> "The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial.
>
> "The district judge is not the proper agency to determine that there was sufficient evidence at the trial, other than that given by Mazzei, to sustain a conviction of any of the petitioners. Only the jury can determine what it would do on a different body of evidence. . . ." supra at 9, 12.

Chief Justice Warren went on to conclude:

> "Mazzei, by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity. This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity. . . .
>
> "The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them. The interests of justice call for a reversal of the judgments below with direction to grant the petitioners a new trial." supra at 14.

The facts of the instant case are, if anything, even more compelling than those in Mesarosh. Here Yamada's alleged fraud, motivated as was his cooperation with the United States Attorney by a desperate desire for leniency, grew out of the same circumstances, the same operative set of facts as his testimony at Persky's trial. Mazzei's alleged untruths, on the other hand, were all uttered in

wholly unrelated matters, some of them made, in fact, years after his testimony at the petitioner's trial.

Moreover, in Mesarosh the witnesses' alleged lack of credibility was based solely upon the "belief" of the Solicitor General. In the case at hand, however, we have a much graver confession of error: the prosecution has indicted its main witness for numerous perjuries, and Yamada has pleaded guilty to six counts of that indictment.

Professor Moore, citing Mesarosh, states that under such circumstances it would constitute an abuse of discretion to deny defendant a new trial. 8A Moore's Federal Practice ¶ 33.03[2] at 33-17n.20 (2d Ed. 1965). Thus, for example, when the United States District Court for the Central District of California was confronted with the issue, it stated:

> "It should also be noted that the Supreme Court has, in its supervisory capacity over the federal courts, held that a new trial is required when it is discovered subsequent to trial that a key Government witness in a federal criminal case was not reliable." Imbler v. Craven, 298 F. Supp. 795, 805 (C.D. Cal. 1969). (Emphasis added.)

Much has been made of the fact that Mesarosh is not an "ordinary" case since it was the Government, rather than the defense, which brought into doubt the credibility of a key prosecution witness:

> "Such an allegation by the defense ordinarily will not support a motion for a new trial, because new evidence which is 'merely cumulative or impeaching' is not, according to the often repeated statement of the Courts, an adequate basis for the grant of a new trial." Mesarosh v. United States, supra at 9.

However, United States v. Chisum, 436 F.2d 645 (9th Cir. 1971), makes into law what is evident to common sense: that for purposes of a motion for a new trial, a criminal indictment will be considered tantamount to the Solicitor General's admitted doubts about the reliability of a Government witness.

In Chisum, defendant was convicted of various narcotics offenses, principally upon the testimony of one Saiz, a Government informer. Two years later, Chisum filed a motion to vacate the judgment and grant him a new trial in support of which he presented the Court with a copy of a multicount indictment which had recently been brought against Saiz.

The Court on its own initiative ascertained that Saiz had pleaded guilty to a single count, that of giving false testimony at a trial unrelated to Chisum's, and was subsequently sentenced to a year's imprisonment.

The Court, citing extensively from Mesarosh, reversed the District Court's denial of defendant's motion for a new trial, stating:

> "This case differs from Mesarosh in one respect. There, as the Chief Justice emphasized, it was the government which brought Mazzei's perjury to the Court's attention. In our case, it is the defendant who has done so. But what is before us is not the usual case in which a defendant asserts that a witness has perjured himself. Here, it is the government itself that brought the charge against Saiz and Downing. . . .
>
> "We hold that Chisum's conviction is as much tainted as was the conviction in Mesarosh." supra at 649.

Judge Wyatt, in denying the motion for a new trial, stated that he believed that Yamada's new crimes and conviction were

> ". . . cumulative on impeaching his credibility." (App. 4)

What Judge Wyatt seemed unwilling to acknowledge was that what was brought to his attention was not merely an additional series of falsehoods occurring prior to Yamada's "cooperation" with the Government, but a new series of acts motivated entirely by a desire to avoid a jail sentence.

All of Yamada's acts summarized in Indictment 74 Cr. 100, called directly into question all of Yamada's testimony against appellant.

Appellant does not urge upon this Court that a subsequent violent crime or narcotics violation by Yamada would have been sufficient to invoke the holding of Mesarosh, supra.

What appellant does urge is that when indisputable evidence (an indictment and guilty plea) of a series of crimes comes to the attention of the District Court, and such evidence cuts to the heart of the witness' credibility and lays bare an ulterior motive for testifying, the District Court is required to grant a new trial in the interests of justice.

The substance and the particulars of Yamada's testimony at trial are additionally cast in grave doubt because of the uncanny resemblance between it and the "forged, fictitious and false" letters he submitted to Judge Cooper. In both cases Yamada constructed intricate and detailed relationships; in both cases he displayed a brilliance at manufacturing events and inventing sophisticated transactions. The psychological similarity between his recounting at trial of the events which incriminated Persky, and the fantasy world he created in his fraudulent letters to Judge Cooper is so striking that the very substance of his trial testimony must be viewed as thoroughly discredited. This conclusion is made all the more valid when one considers that Yamada's motivation in both instances grew out of the same overbearing desire to obtain leniency -- at any cost.

Judge Lasker in sentencing Yamada recognized that despite Yamada's claim of repentence at Persky's trial, his deceptions had not ceased:

> "The crime you committed here . . . is . . . a nasty crime. . . . it was nasty, because first of all, it was pure deception and, secondly, it was a continuing course of conduct which you admitted prior to this time . . . . it goes to the very heart of the judicial process." (App. 47)

The present case is not an "ordinary" motion for a new trial. Falling, as it does, well within the confines of the Mesarosh and Chisum principles, the interests of justice demand that a new trial be granted Robert S. Persky.

POINT II

EVEN UNDER THE MINORITY VIEW OF MESAROSH V. UNITED STATES, THE STATEMENTS CONTAINED IN THE GOVERNMENT'S SENTENCING MEMORANDUM ARE SUFFICIENT IN THEMSELVES TO WARRANT THE GRANTING OF A NEW TRIAL

The majority in Mesarosh held that only a trial de novo is sufficient to remove the taint from a conviction obtained through the testimony of a witness whose credibility and truthfulness the Government itself subsequently calls into question. The minority in Mesarosh believed that the issue of credibility could be adequately dealt with at an evidentiary hearing, after which a new

trial would be ordered if the evidence indicated that there was more than a hint that the Government witness was unreliable. Even were this procedure to be followed, however, it is clear that the statements made in the Government's sentencing memorandum with respect to Yamada would be sufficient in themselves to warrant the granting of a new trial in the interests of justice. This conclusion follows for the following reasons:

(1) The sentencing memorandum firmly establishes Yamada's predisposition to seize upon suggestions made to him by Government officials, and from that starting point, to fabricate facts and events which would serve to substantiate such otherwise unfounded suggestions. The Government itself dramatically underscores that disturbing tendency when it states that Yamada concocted his fraudulent letter scheme at his first sentencing, when Judge Cooper contrasted his situation with that of other defendants who had engaged in redeeming social work (See App. 54). The extent of Yamada's suggestibility is indicated by the fact that his forged correspondence attempted to parrot the very language of the prosecutor at his first sentencing. Thus, the Government's memorandum notes at App. 56:

> "The letters betray a deliberate effort to fabricate information which Yamada knew would commend themselves to Judge Cooper's attention. The first letter, for example purportedly written by the physician-director of the clinic, states, 'I find it inconceivable that a man who had devoted a tremendous amount of time over the past two years to interview our patients and help secure employment for may should be sentenced for violations which were committed before entering a new field of business and social outlook.' Such language appears almost as a direct response to an observation of the prosecutor at the time of sentence: '...having recently reread your Honor's opinion in the Benjamin Haggett motion for reduction of sentence I know that your Honor is of the very strong opinion that it is as much the conduct of the defendant after the crimes have been committed as it is his conduct before which must be taken into account by a sentencing judge'".

If Yamada was thus capable of seizing upon random, extemperaneous remarks made at his own sentencing and parlaying them into a complex scheme, how much creedence can be given to his testimony at trial, which was preceeded by numerous meetings with the S.E.C. staff and U.S. Attorney's office, at which his elaborate falsehoods would undoubtedly have received repeated promptings?

(2) The sentencing memo concedes that Yamada broke his plea bargaining arrangement "almost as soon as it was made." (App. 61). In light of the haste and wholesale manner in which the pact was violated, it cannot be realistically contended that Yamada's testimony at trial was wholly

credible, and that it was only after the trial that he was suddenly and miraculously transformed back into an individual who, as the Government states at App. 65,

> "...fully expected to manipulate the court, just as he had previously manipulated the victims of his financial frauds...[and who] has demonstrated a cynical disregard for the administration of justice and an attitude that this Court is as vulnerable to deception as any victim of a securities fraud."

Such "scaffold conversions" are to be viewed with the utmost skepticism, and in the context of the present case, common sense dictates that Yamada did not suddenly revert to his old ways, but rather that his perjury persisted unabated throughout his dealings with the Courts.

(3) The Government's memo comments upon Yamada's predilection for drawing innocent individuals into his web of criminal activities. Thus, his own secretary, his chauffeur and his chauffeur's wife were suborned into committing forgery, and Yamada did not scruple to unjustly malign a physician and a probation officer.

The Government takes pains to note that Yamada's counsel was unaware of this fraudulent scheme (App. 55). Yet, supposing the Government was seeking to prosecute Yamada's counsel in this matter, and Yamada, attempting to shift the blame, testified that his counsel had knowledge

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of the fraud and had in fact approved it. Given Yamada's proclivity for involving innocent people in his affairs, would his testimony in such a case be given any creedence? Clearly not, -- and yet this is precisely the predicament in which Persky found himself in U.S.A. v. Zane et al.

Thus, even were this Court to adopt the procedure set forth in the minority opinion of Mesarosh v. United States, a new trial would clearly be warranted.

CONCLUSION

For all of the foregoing reasons, the District Court's denial of Robert S. Persky's motion for a new trial should be reversed.

June 27, 1974.

Respectfully submitted,

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